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In the

Supreme Court of the United States

October Term, 1962

COLUMBUS PRODUCTION CREDIT ASSOCIATION,
Petitioner,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Respondent.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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STATEMENT OF THE CASE

During the period 1953 through 1959 the Columbus Production Credit Association, petitioner herein, was located in Columbus, Ohio, and was engaged in the business of making short-term loans to farmers. The petitioner is a corporation organized on January 26, 1934 pursuant to Title II of the Farm Credit Act of 1933 (48. Stat. 267, as amended, 12 U.S.C. 1131 *et seq.*). By virtue of a certificate dated January 31, 1934 the Governor of the Farm Credit Administration directed the Columbus Credit Association to conduct operations in a district composed of eight counties in central Ohio.

Section 20 of the Farm Credit Act of 1933 (12 U.S.C. 1131d) authorized the Governor of the Farm Credit Administration to charter corporations to be known as production credit associations. Sections 20, 23 and 24 of the

Act (12 U.S.C. 1131d, 1131g and 1131h) provided that such organizations might be organized by ten or more farmers who desired to borrow money under the Act. The governor was authorized to fix the territory in which the association might operate (12 U.S.C. 1131d). Each association was to operate under the direction of a Board of Directors elected by its members. The associations were to be governed by those rules and regulations of the district Farm Credit Boards which were approved by the Farm Credit Administration.

Congress provided $120 million to get the production credit program under way. (48 Stat. 258). It authorized the Governor of the Farm Credit Adminstration to subscribe for $7,500,000 in stock in each of the twelve production credit corporations[1] (48 Stat. 257-58). The production credit corporations in turn were authorized to finance the local production credit associations by investing this money in Class A nonvoting stock of the associations. (48 Stat. 259, 260).

The Farm Credit Act of 1933 did not purport to call for perpetual federal investment in local production credit associations such as petitioner. Instead it provided for these associations to become wholly farmer-owned cooperatives. Both during the period when outstanding Class A stock was held by production credit corporations, and subsequent thereto, farmers participated in the ownership and management of production credit associations. Thus, Class B one-vote-per-member stock was provided for, and this stock could be "purchased only by farmer borrowers from the association and individuals eligible to become borrowers" (48 Stat. 260, 12 U.S.C. 1131e). The associations were

[1] In 1956 the production credit corporations were merged into the regional federal intermediate credit banks. (Farm Credit Act of 1956 §101, 70 Stat. 659, 12 U.S.C. §1027) This merger has no bearing on this case.

and are authorized to pay up to 7% dividend on both Class A and Class B stock (12 U.S.C. 1131f). The Farm Credit Act also provided that the regional production credit corporation "may at any time require the association to retire and cancel stock held by the corporation in such association, if, in the judgment of the corporation, the association has resources available therefor" (48 Stat. 259, 12 U.S.C. 1131c).

Since 1953, all the shares of Class A stock held in the Columbus Production Credit Association by the Governor of the Farm Credit Administration (who acquired such stock upon merger of the production credit corporations with the federal intermediate credit banks) have been retired. Since 1953 neither the Federal Government, nor any of its officials, have held shares of any class whatsoever in said association. Since 1953, the total shareholder interest in the Columbus Production Credit Association has been in the hands of parties other than the Federal Government or its officials.

Section 63 of the Farm Credit Act of 1933 (48 Stat. 267, as amended, 12 U.S.C. 1138c) provides a tax exemption for the production credit associations in the following terms:

> "Such * * * associations, their property, their franchises, capital, reserves, surplus, and other funds; and their income, shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority; except that any real property and any tangible personal property of such * * * associations * * * shall be subject to Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed."

Accordingly, petitioner has regularly paid taxes on its real estate (*i.e.*, its office building). The last sentence of Section 63 provides:

> "The exemption provided herein shall not apply with respect to any production credit association or its property or income after the class A stock held in it by the Governor has been retired * * *."

The Governor's Class A stock in petitioner having been retired, petitioner also pays a tax imposed by Sections 5725.13-.17 of the Ohio Revised Code on the intangible property of a dealer in intangibles, which tax is (under Section 5725.26 of the Ohio Revised Code) in lieu of all other taxes on the property and assets of such dealer, other than real estate.

The Ohio Department of Taxation assessed franchise tax arrearages against petitioner for the years 1953 through 1959 in the total amount of $6,947.25 plus a 15% penalty. Petitioner applied for review and the assessment was affirmed by the Tax Commissioner.

Petitioner appealed to the Ohio Board of Tax Appeals which reversed the Tax Commissioner, finding "no clear waiver of immunity in positive language" in Section 63 of the Farm Credit Act. The Supreme Court of Ohio in *Columbus Production Credit Association v. Bowers*, 173 O. S., 97, 180 N. E. (2d), 1, reversed the Board of Tax Appeals and affirmed the order of the Tax Commissioner, finding that in Section 63 of the Farm Credit Act, Congress in broad, plain and unambiguous language consented to state taxation of production credit associations.

QUESTION PRESENTED

Whether, in view of Section 63 of the Farm Credit Act of 1933, which provides a qualified exemption from state taxation for production credit associations, a state can constitutionally subject such an association to a tax on its federal franchise after all of the stock held in the association by the Federal Government has been retired.

ARGUMENT

I.

The decision of the Ohio Supreme Court is reasonable, lawful and correct and not in conflict with any decisions of this court.

A.

Petitioner in its first argument for writ of certiorari to this Court states that the Ohio Supreme Court based its decision on the ground that by the last sentence of Section 63 of the Farm Credit Act of 1933 Congress in clear, broad and unambiguous language waived petitioner's immunity from taxation. Petitioner then attacks this position arguing that all waivers of federal immunity must be in clear and unmistakable language and because the waiver here is not a verbatim repetition of terms of the exemption, it is not a clear waiver. Therefore, reasons petitioner, the decision of the Ohio Supreme Court that the waiver is clear cannot be sustained.

On the contrary, the respondent, Tax Commissioner of Ohio, first submits that petitioner has erred in its basic assumption. The subject matter before the Ohio Supreme Court was not federal immunity, but a specific statutory exemption from state taxation. The statute itself calls this removal from state taxing power an exemption, and of course the creation of such an exemption would have been wasted action were sovereign immunity involved. Consequently, the Ohio Supreme Court did not speak of a "waiver"[2] of governmental immunity in its decision for only a removal of an exemption was involved.

Exemption and immunity are two different terms. Exemption involves the supposition that property so ex-

[2] Petitioner at page 9 of its brief when speaking of the Ohio Supreme Court decision put the word *waiver* in quotation marks. Yet, the word *waiver* does not appear in the Ohio Supreme Court's opinion.

empted otherwise would be subject to taxation. Immunity involves the idea that, absent a constitutional or statutory provision, property would not be subject to taxation. *State v. City of Hudson*, 231 Minn., 127, 42 N.W. (2d), 546, 549. The cases of *Austin v. The Aldermen*, 7 Wall., 694, and *Kern-Limerick, Inc., v. Scurlock*, 347 U.S., 110, cited by petitioner both concerned waivers by Congress of federal immunity and both posited a requirement of clear and unmistakable language for such waiver. Whatever the requirements for a waiver of federal immunity, respondent submits that a sentence removing a statutory exemption set out in the same paragraph should be examined in a different light.

Respondent notes that petitioner's basic argument is that the removal of the exemption is not effective as to franchise taxes because the removal sentence is not coextensive with the exemption, and coextensive, according to petitioner, means a verbatim repetition of terms. However, the respondent answers that even though there is no verbatim repetition of terms, the consent to taxation is coextensive with the exemption. An examination of the statute itself indicates that certain items were given exemption, and then on specified conditions the exemption was removed from three subjects of taxation, *viz.*, (1) the production credit association, (2) its property and (3) its income. Considering that under the terms of the statute itself real and personal property were already subject to taxation, Congress, when removing the exemption as to property, could only be referring to those items of intangible property previously exempted. Thus, Congress itself felt that general language could be used to remove the granted exemption and used such language.

Furthermore, petitioner itself now pays taxes on intangible property, even though the consent to tax does not

repeat such terms as capital, surplus, reserves or other funds. Thus, petitioner itself does not accept its own reasoning that the exemption may be removed only by a verbatim repetition of terms.

Moreover, In *Zeiss, et al. v. Brenham Production Credit Ass'n.*, 259 S.W. (2d), 299 (Tex Civ. App. 1953), the only other case in this area, the Texas Court at page 301 stated the question before it in the following terms:

> "* * * whether the Capital Stock and Surplus of a Production Credit Association * * * is subject to taxation by the city in which it has its principal office, after it has repaid or 'retired' all money invested in it by the Federal Government and its agencies; and after it becomes completely owned by individuals."

The Texas Court held that the Production Credit Association was no longer exempt from taxation after the stock held in it by the United States or any of its agencies was retired. On appeal, *Brenham Production Credit Association v. Zeiss, et al.*, 264 S.W. (2d), 95 (1953), the Court said at page 96:

> "* * * It is conceded that this property may be assessed for taxation by the State * * * since all of the stock held in the association by the Production Credit Corporation has been retired. * * *"

The appellate Court then reversed the holding of the lower Court on the ground that the Production Credit Association was not a banking corporation within the meaning of the state statute. However, it is important to note that the Texas Court of Appeals held the capital stock and surplus of the association to be taxable once the exemption as to property was removed, and the association conceded this when it appealed. And in the instant case the petitioner makes the same concession by noting that it pays intangible tax. So, the respondent, Tax Commissioner of Ohio, sub-

mits that Congress intended, and petitioner agrees, that the removal of exemption in the last sentence of Section 63 of the Farm Credit Act applies to specific items in the exemption even though the removal sentence does not repeat those items verbatim.

As noted, the last sentence of Section 63 of the Act removes the tax exemption from three subjects, one of which is the production credit association itself. It is the contention of the Tax Commissioner of Ohio that if the removal of the exemption as to property renders capital and surplus taxable, the removal of the exemption with respect to the association itself means that the association as a business organization may be taxed and the association certainly includes the franchise. Therefore, respondent submits that the removal of the exemption is coextensive with the exemption even though there is no verbatim repetition of terms. Being coextensive, the removal of the exemption is as clear as necessary to render taxable the specific interests exempted earlier in the same paragraph.

B.

In its second argument the petitioner accuses the Ohio Supreme Court of ignoring the legislative history of the statute. Petitioner's argument is that the statute has intended to provide for low interest loans and that any but a very narrow construction of the removal of exemption would undermine the salutary purposes of the legislation. To show legislative history and intent the petitioner cites the message of President Roosevelt asking for such legislation and a statement of the sponsor of the bill that high interest rates are the curse of agriculture.

Respondent submits that more pertinent to the legislative history of the Farm Credit Act of 1933 are the committee reports accompanying the act which refer to "the tax ex-

emption" in general terms and make it clear that petitioner is not exempt here since its federally financed stock has been retired:

> "Section 63 provides that the corporations organized under the act shall be exempt from taxes, except that their real property and tangible personal property may be taxed. The tax exemption with respect to any production credit association and its property and income is not to apply after stock held in it by the production credit corporation has been retired . . ."

Sen. Comm. on Banking & Currency, *Farm Credit Act of 1933* S. Rep. No. 124, p. 6, 73rd Cong., 1st Sess. (1933). House Com. on Agriculture, *Farm Credit Act of 1933* H.R. Rep. No. 171, p. 6, 73rd Cong., 1st Sess. (1933) (same). In 1955 the Farm Credit Act was amended by Congress to provide for issuance of Class C stock (not issued or pertinent here). Among the sections amended was Section 63 of the Farm Credit Act. Section 63 was amended by Public Law 347, c. 785, Title II, sec. 205 (69 STAT. 663). In reporting on HR 5168, which later became Public Law 347, the House Committee on Agriculture had this to say about the existing law:

> "Under present law a production credit association is exempt from most taxes so long as the production credit corporation (now the Governor) owns any of its stock. When all stock of the association owned by the corporation (now the Governor) is retired, such tax exemption would terminate. Section 205 would provide that where the production credit corporation (now the Governor) holds no class A stock of an association but owns class C stock * * * the asseociation would be subject to taxation."
>
> (Parenthetical matter added) H. R. Rep. No. 863, 84th Cong., 1st Sess. (1955). Reported in U.S. Code Cong. & Ad. News (1955) vol. 2, p. 2949 at p. 2965)

Thus, it appears that in holding that the broad language of the last sentence of the exemption statute removed the

exemptions set out in the previous sentence, the Ohio Supreme Court did follow the intent of Congress.

Moreover, it appears that Congress' purpose in passing Section 63 of the Act was to provide an exemption only so long as stock financed by federal funds was still outstanding. It provided funds and an exemption simply to get the associations started during the depression. It was not Congress' intention to continue a tax exemption for associations which were on their feet after the depression and in which there was no longer any federal investment. Indeed, Congress provided that the associations would become more independent of federal control over certain internal affairs when the federally financed stock was retired (Farm Credit Act Sec. 21, 48 Stat. 260). Congress thus did not intend to extend the exemption of taxation beyond the period when the government held stock therein. Certainly Congress did not wish to give such associations a perpetual tax advantage as they improved their competitive position with other privately owned lending institutions which are subject to taxation.

The petitioner relies heavily on the fact that the production credit association is called a government instrumentality and is under the control of the Governor of the Farm Credit Administration. However, as petitioner notes, the extent to which an instrumentality of the United States may be taxed by a state is a matter for Congress alone to determine. In the statute in question Congress clearly intended to provide exemption from taxation with respect to this particular federal instrumentality and then on certain conditions to remove the exemption. These conditions have been met. Now that the Federal Government has turned over the property interest in petitioner to private parties, petitioner is a government instrumentality only in the sense that a corporation chartered under the laws of

Ohio and operated by private parties is an Ohio instrumentality; that is, that it operates under the laws of the government which chartered it.

With respect to the fact that the petitioner is under the control of the Governor of the Farm Credit Administration, the respondent notes that this is merely the necessary result of the fact that no federal corporation law exists, and so Congress must establish control anew for each corporation it charters. The respondent submits that the Governor in this case stands in the same place that state corporation laws stand with respect to state-chartered corporations. The petitioner is under the control of the Governor of the Farm Credit Administration; state corporations are under the control of their own state corporation laws as well as, in certain cases, the state banking commission and other agencies. Respondent therefore submits that there is no magic in the fact of the Governor's control which *ipso facto* renders the petitioner immune from taxation. Congress' intent was to remove exemption from taxation while retaining federal control.

It is, therefore, the contention of the respondent that the Ohio Supreme Court in construing the statute before it gave effect to the intent of Congress to subject production credit associations to state taxation when the government capital in such associations was withdrawn.

II.

Petitioner has shown no lack of uniformity among the states in interpretation of Section 63 of the Farm Credit Act.

Petitioner notes that seven states in addition to Ohio claim the right to tax the exercise of production credit association franchises, eight states claim they have no power to levy such a tax and the question has not been considered

in the other states. Petitioner contends that the associations are entitled to a uniform rule regarding their amenability to state franchise taxes.

However, state taxation of production credit associations depends in the first instance on whether such associations fall within the ambit of local taxing laws. Respondent submits that the petitioner has made no clear showing that the decisions of eight states not to tax the exercise of production credit associa on franchises were based entirely upon interpretations of Section 63 of the Farm Credit Act. Unless the franchise tax laws of the eight states which decline to tax the exercise of production credit association franchises have been found to extend to such franchises, the conflict of interpretations of Section 63 contended for by petitioner cannot be shown to exist.

Moreover, by noting the purported annual tax burden on the federal farm system if this petition for writ is denied, petitioner must assume that denial of petition for writ of certiorari here will result in uniform interpretation of Section 63 of the Farm Credit Act throughout the Nation on the basis of the Ohio Supreme Court's decision. Such uniformity as petitioner desires can therefore be achieved by this Court by denying this petition.

III.

A denial of a writ of certiorari in this case will not result in state taxation of federal interests.

Petitioner in discussing the financial importance of this case indicates that if the Ohio decision is affirmed the federal farm credit system will be subject to the burden of taxation. This, of course, is not exactly true since franchise taxes are not assessed against production credit associations which have federally owned stock. Whatever the burden of tax on the privately owned associations, it rests

ultimately on the shareholders, who like other shareholders in other lending institutions are private citizens in business for a profit. The burden is not on the Federal Government.

CONCLUSION

In view of the correct and lawful decision of the Ohio Supreme Court which is in accord with congressional intent, and not in conflict with decisions of this Court, the petition for writ of certiorari in this case should be denied.

Respectfully Submitted,

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